

**IN THE COURT OF APPEALS OF IOWA**

No. 3-975 / 13-0120  
Filed January 9, 2014

**KIMBERLY S. JASPER,**  
Plaintiff-Appellee,

**vs.**

**ZAKIA HUSSAIN and INTERNATIONAL  
FASHIONS & GIFTS, INC.,**  
Defendants-Appellants.

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Appeal from the Iowa District Court for Polk County, Mary Pat Gunderson,  
Judge.

Zakia Hussain appeals from the district court's finding that, to avoid paying  
a judgment, she conspired with her husband to fraudulently transfer property to  
her company in which she was the sole shareholder. **AFFIRMED IN PART AND  
REVERSED IN PART.**

Andrew B. Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West  
Des Moines, for appellants.

Mark D. Sherinian, West Des Moines, for appellee.

Heard by Vogel, P.J., and Potterfield and McDonald, JJ.

**VOGEL, P.J.**

Zakia Hussain appeals from the district court's finding that she conspired with her husband to fraudulently transfer property to her company in which she was the sole shareholder. Zakia claims the evidence shows the property was validly transferred to avoid foreclosure, rather than fraudulently to avoid paying a judgment to Kimberly Jasper. However, even if fraud was established, Zakia argues Jasper suffered no prejudice because there was no equity in the property. On our de novo review, we agree with the district court Jasper showed by clear and convincing evidence the property was fraudulently conveyed and she was prejudiced by this conveyance. We disagree with the district court as to the amount of equity, and therefore reverse in part. However, given the intentional fraudulent conduct, we hold the punitive damages award was both appropriate and not excessive. Therefore, we affirm in part and reverse in part.

**I. Factual and Procedural Background**

In September 2005, after a jury found Mohsin Hussain and his company, H. Nizam, Inc., wrongfully terminated Kimberly Jasper from employment, Jasper obtained a judgment, later reduced to \$76,915. On November 4, 2005, a foreclosure decree was entered in favor of Great Western Bank and against the property in Windsor Heights owned by Mohsin's company in the amount of \$209,640.95. On November 25, 2005, while posttrial motions were pending in the wrongful termination case but before Jasper's judgment was entered, Mohsin transferred the Windsor Heights property to International Fashions and Gifts, a

company in which his wife, Zakia Hussain, was the sole shareholder.<sup>1</sup> The consideration for this transfer, as listed on the warranty deed, was “one dollar and other valuable consideration.”<sup>2</sup> Also in November 2005, Mohsin, by quit claim deeds, transferred his interest in the couple’s homestead and his rental property to Zakia. Mohsin later filed for bankruptcy, declaring he had no assets. In February 2006, Zakia had the property appraised by Frandson Knapp & Associates, which assessed the property’s value at \$295,000. In March, Zakia refinanced the property, paid off the foreclosure judgment and various tax liens, and then received \$14,423.01 in cash. Zakia testified she later sold the property in a short sale for \$245,000.

On August 6, 2010, Jasper filed a petition against Zakia and her business, International Fashions and Gifts, Inc., alleging the property was fraudulently transferred to prevent Jasper from collecting on her judgment. A bench trial was held, with the court sitting in equity. At trial, Mohsin and Zakia maintained the transfer was to avoid the foreclosure, asserting no bank would refinance the property if Mohsin was the title holder.

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<sup>1</sup> Other than the property currently at issue, Mohsin’s business had no other assets. Furthermore, the record is unclear as to how Mohsin was able to transfer title subsequent to the filing of the foreclosure decree.

<sup>2</sup> A notation on the warranty deed written by Zakia stated: “Exempt transaction—transaction between family members ZH.” In its order, the district court asserted: “Mrs. Hussain is an auditor for the State of Iowa and works for the Department of Revenue. She testified at trial she did not know the effect of designating the transaction as exempt. She hired and paid for the preparation of the warranty deed.” Specifically, when discussing the notation on the deed, the following exchange occurred:

Q: And effectively you were saying that because this transaction was between family members, it was exempt from the payment of the transfer tax.

A: I don’t think I am saying that. I am not aware of any exempt of tax. Regardless of what, you have to pay tax. So it is just a transfer.

Following the close of all the evidence, the district court held Mohsin fraudulently transferred the property to avoid paying Jasper the judgment lien, found equity in the property, and so determined Jasper was prejudiced. The court also found the couple's explanation the transfer was to avoid the foreclosure not credible, as there was no evidence Mohsin attempted to refinance the property in his own name, nor was there an explanation as to why title to the other two properties were also transferred out of Mohsin's name. The court further held the evidence supported the finding the Hussains engaged in a conspiracy to defraud Jasper. Consequently, the court assessed \$75,081.36, representing the equity in the property, as compensatory damages, and \$25,000 in punitive damages. Zakia now appeals.

## **II. Finding of Fraud**

Zakia maintains the evidence shows the property was transferred to avoid the foreclosure because Mohsin could not obtain a refinancing loan in his own name. Alternatively, she asserts Jasper's fraud claim must fail as the property had no value, and therefore, Jasper cannot prove she was prejudiced by the transfer. She also asserts that, if we were to find the property was fraudulently transferred and Jasper suffered prejudice, that \$75,081.36 is the incorrect amount of damages, and the limit should be the \$14,423.01 Zakia received in cash from the refinance.

### **A. Standard of review**

We review cases tried in equity de novo. *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444, 452 (Iowa 2013). Though we give weight to the trial court's findings of fact, particularly when considering the credibility of

witnesses, we are not bound by those findings. *Id.* We must examine the entire record and adjudicate anew the rights of the parties on the issues presented. *City of Wapello v. Chaplin*, 507 N.W.2d 187, 188 (Iowa Ct. App. 1993).

To prove a claim of fraudulent conveyance, the plaintiff must show by clear and convincing evidence, first, that a fraudulent transfer occurred, and second, that she was prejudiced by the transfer. *Generic Farms v. Stensland*, 518 N.W.2d 800, 803 (Iowa Ct. App. 1994).

### **B. Whether the evidence supports the finding of fraud**

A claim of fraudulent conveyance arises under Iowa Code section 684.4(1)(a) (2009), which states:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation under any of the following circumstances:

- a. With actual intent to hinder, delay, or defraud any creditor of the debtor.
- b. Without receiving a reasonably equivalent value in exchange for the transfer or obligation . . . .

When determining intent, courts consider the following factors:

- a. Whether the transfer or obligation was to an insider.
- b. Whether the debtor retained possession or control of the property transferred after the transfer.
- c. Whether the transfer or obligation was disclosed or concealed.
- d. Whether, before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
- e. Whether the transfer was of substantially all the debtor's assets.
- f. Whether the debtor absconded.
- g. Whether the debtor removed or concealed assets.
- h. Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

i. Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

j. Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.

k. Whether the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Iowa Code § 684.4(2)(a)–(k). Additionally, “[a]ll of the circumstances of any given transaction must ordinarily be considered together.” *Generic Farms*, 518 N.W.2d at 803.

With respect to the finding of fraud, the district court stated it found:

[T]he following badges indicating a fraudulent conveyance:

1.) The transfers were made after a verdict was entered against the debtor;

2.) Mohsin Hussain transferred the property to his wife’s corporation with her direct involvement . . . .

3.) The transfer constituted most of his assets and he was insolvent as the result of making this transfer and subsequently filed for bankruptcy; and

4.) At approximately the same time, he transferred the only two other major assets he owned, the homestead and a rental property.

Additionally, the Court finds the property was conveyed for substantially less than adequate consideration.

It further found not credible the explanation the property was transferred due to the foreclosure judgment and Zakia’s claim the property could not be refinanced if it remained in Mohsin’s name.

We agree with the district court enough factors exist to support the finding of a fraudulent conveyance. Mohsin transferred the property to his wife’s company for “one dollar and other valuable consideration.” Although this is not an uncommon term used in deeds, Zakia testified she paid nothing for this transaction. These are two factors indicating fraud. See Iowa Code § 684.4(2)(a), (h); *First Nat’l Bank v. Frescoln Farms, Ltd.*, 430 N.W.2d 432, 435

(Iowa 1988) (“When a transfer of property is without consideration, our longstanding rule has been to presume the transfer fraudulent.”). The timing, however, is most suspect—the transfer was conducted after the jury returned its verdict against Mohsin but before the judgment was entered. Thus, he and Zakia had knowledge of an impending judgment lien, disagreed with it, and so it appears they took protective action by way of transfer of title to avoid the lien attaching to the real estate. See Iowa Code § 684.4(2)(d), (j).

Additionally, Mohsin’s business had no other assets other than the property at issue. Once that was transferred, H. Nizam Inc. was without funds and property. Mohsin himself transferred all of his other assets as well, that is, his interest in the couple’s homestead and in the rental property, after which he filed for bankruptcy. No explanation was given for these transfers, which supports the finding of a fraudulent conveyance. See *id.* § 684.4(2)(e), (i).

Moreover, the district court’s finding the Hussains were not credible is persuasive. The trier of fact is in the best position to evaluate the credibility of witnesses, and the court’s determination holds weight. See *Horsfield Materials*, 834 N.W.2d at 452. Thus, the explanation that the property could not be refinanced in Mohsin’s name as well as the Hussains’ purpose for the transfer—to avoid foreclosure—is not credible. Zakia also testified she was part of the decision to transfer the property to her company, asserting Mohsin’s inability to obtain refinancing. There was no explanation as to why Mohsin’s other property was transferred.

Given the six statutory factors that are present, as well as the lack of credibility on the part of the Hussains, we agree with the district court the

property was fraudulently conveyed as defined in Iowa Code section 684.4(2). See *Generic Farms*, 518 N.W.2d at 803 (holding the fact the contracts were transferred without adequate consideration, immediately after a judgment was entered against the transferor, in addition to the insolvency of the transferor, was enough to prove fraudulent conveyance).

**C. Whether Jasper suffered prejudice and, if so, in what amount**

Zakia next argues Jasper suffered no prejudice because the property had a negative net equity at the time of the transfer, and therefore Jasper cannot succeed on the second element of her claim. She maintains she owed \$214,491.96<sup>3</sup> to the mortgage-holding bank and \$74,000 to the previous title holder, Glendora M. Woods, which, using the lower valuation of \$260,000, results in the property having a negative net equity. She further references the fact the property was later sold at a loss.

We determine whether Jasper was prejudiced by the conveyance if she can show she would have received something which was otherwise lost by reason of the conveyance. *Id.*; see also *Prod. Credit Ass'n of Midlands v. Shirley*, 485 N.W.2d 469, 474–75 (Iowa 1992) (holding that the sale of shares for inadequate consideration prejudiced the creditor because the creditor could have levied against the full value of the shares). If prejudice can be shown, the proper valuation of damages is the amount of equity in the property. See *Benson v. Richardson*, 537 N.W.2d 748, 760–61 (Iowa 1995) (holding the amount of damages was the equity in the property as obtained by the fraudulent transfer of exempt funds). This conclusion follows because the equity would be the amount

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<sup>3</sup> This includes the judgment of \$209,640.95 plus \$4851.01 in attorney fees.



lost due to the fraudulent transfer. Additionally, “the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.” Iowa Code § 684.8(3).

Here, there are two valuations of the property. In addition to Zakia’s appraisal from Frandson Knapp & Associates valuing the property in February 2006 at \$295,000,<sup>4</sup> Jasper’s appraiser, Michael Olson, testified the property’s value—as of November 25, 2005—was \$260,000. Olson’s appraisal, however, was not conducted until 2012 and is lower than the Polk County Assessor’s valuation from 2005. Zakia uses Olson’s appraisal as the basis for her calculations, ignoring her own higher appraisal of \$295,000, conducted just after the transfer was made but before her refinance.

On our de novo review, we agree with the district court that the appraisal of Zakia’s own experts, Frandson Knapp & Associates in February 2006, is the more appropriate figure to use to determine the property’s value.<sup>5</sup> The figure of \$295,000 establishes the value of the property closest in time to the transfer. Furthermore, the \$295,000 appraisal is given more credence by the March refinancing where Zakia was able to refinance the property in the amount of \$221,250, seventy-five percent of the property’s value. Therefore, the most reliable valuation at the time of transfer is \$295,000.

As for the amount of debt attached to the property at the time of transfer, we begin by examining the foreclosure decree. As set forth in that judgment,

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<sup>4</sup> Zakia also admitted during cross-examination that the refinancing loan was for seventy-five percent of the property’s value, which would be \$295,000.

<sup>5</sup> The district court used \$294,000 as the property’s value. However, the record reflects the Frandson Knapp & Associates appraisal was in fact \$295,000 and that is the figure on which we rely.

dated November 4, 2005, the mortgage balance plus interest was \$209,640.95.<sup>6</sup> The costs of the foreclosure action were assessed against the property in the amount of \$4851.01. Woods was also named in the foreclosure action, but it is unclear from the record what amount was owed to Woods as of November 2005. Though the district court used the 2007 compromised settlement amount of \$30,000, the original amount was \$74,000 and is uncontested as outstanding in November 2005. If we subtract these amounts from the valuation, it results in a net equity of \$6508.04 [\$295,000 minus \$209,640.95 minus \$4851.01 minus \$74,000 = \$6508.04]. With a positive net equity in the property, we agree Jasper was prejudiced by the transfer. See *Textron Fin. Corp. v. Kruger*, 545 N.W.2d 880, 884 (Iowa Ct. App. 1996) (holding prejudice was established because, but for the fraudulent transfer, the land would have been available for the plaintiff to attach its security interest).

Therefore, we reverse the district court in part, as the court's calculation of compensatory damages was based off the refinancing documents in March 2006. However, the record is unclear as to why the amount due to the bank declined from \$209,640.95 in November 2005, to \$147,284.64 in March 2006. Consequently, we find the compensatory damages to be the equity in the property, as can be most closely determined on the date of transfer—that is, \$6508.04—rather than the \$75,081.36 figure ordered by the district court.<sup>7</sup>

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<sup>6</sup> This is contrary to the March settlement statement, which listed the principal balance as \$147,284.64, plus \$41,654 in tax assessments. However, there is no evidence in the record explaining this discrepancy, so we use the \$209,640.95 figure in our calculations.

<sup>7</sup> While Zakia argues in the alternative that \$14,423.01, the amount she received in cash from the refinancing, should be the maximum award, we find that again uses a look-back from the refinancing statement. Because we are required by Iowa Code section 684.8(3) to use the value lost at the time of transfer, we decline to accept this alternative.

### III. Punitive Damages

Zakia next claims the punitive damages award was improper because the Hussains did not willfully and wantonly disregard Jasper's rights. Alternatively, she asserts the award is excessive.

We review the award of punitive damages for correction of errors at law. *Wolf v. Wolf*, 690 N.W.2d 887, 893 (Iowa 2005). We review the excessiveness of the award de novo. *Id.* at 894.

Punitive damages may be awarded if Jasper proved by "a preponderance of clear, convincing, and satisfactory evidence" that Zakia willfully and wantonly disregarded Jasper's rights. See Iowa Code § 668A.1(1)(a). Willful and wanton conduct involves intentional, unreasonable acts "in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow." *Cawthorn v. Catholic Health Initiatives Corp.*, 743 N.W.2d 525, 529 (Iowa 2007) (internal citations omitted). Punitive damages are considered excessive if they are not "reasonably related to actual damages." *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 147 (Iowa 1996) (internal citations omitted). However, "our primary focus in review of a punitive damage award is the relationship between the punitive damage award and the wrongful conduct of the offending party." *Id.*

Regarding the finding of punitive damages, the district court stated:

The Hussains' disregard for the legal system exhibited itself in their conduct immediately after the verdict was issued when they transferred virtually all of Mr. Hussain's assets, as well as those of his corporation, to Mrs. Hussain and her corporation. The Court finds the parties' intent was to avoid paying the judgment which was entered against Mr. Hussain.

We agree. It is clear by Zakia's conduct after the verdict but before the judgment that, in colluding with her husband, she willfully and wantonly disregarded Jasper's right to collect on her judgment.<sup>8</sup> As discussed above, there were six badges of fraud found during the course of these proceedings. This blatant fraud warrants a significant amount of punitive damages. See *Midwest Home Distributer, Inc. v. Domco Indus.*, 585 N.W.2d 735, 743 (Iowa 1998) (affirming the award of punitive damages because the defendant had "no regard as to what consequences its actions might have as far as [the plaintiff] was concerned."). Therefore, despite our lowering of the compensatory damages, the award of \$25,000 remains proper, considering the Hussains' repeated disregard of the legal system and the degree of fraud shown in this case. See *id.* at 148 (affirming an award of two million dollars in punitive damages when compensatory the damages award was \$4000).

Having considered all arguments presented on appeal, we affirm the district court's award of \$25,000 in punitive damages, though we modify the \$75,081.36 judgment to \$6508.04 in compensatory damages.

Costs on appeal assessed one-half to each party.

**AFFIRMED IN PART AND REVERSED IN PART.**

Potterfield, J., concurs; McDonald, J., concurs in part and dissents in part.

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<sup>8</sup> We do not suggest Zakia's conduct in paying priority creditors after the fraudulent transfer of the property justifies punitive damages.

**McDONALD, J.** (concurring in part and dissenting in part)

I concur in the majority's opinion regarding the calculation of compensatory damages, but I respectfully dissent with respect to the award of punitive damages.

"Punitive damages are never awarded as a matter of right." *In re Mt. Pleasant Bank & Trust Co.*, 455 N.W.2d 680, 684 (Iowa 1990). Punitive damages may only be awarded when the plaintiff has shown "by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." Iowa Code § 668A.1(1)(a). Willful and wanton conduct is shown when an intentional act is done "of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." *Cawthorn*, 743 N.W.2d at 529 (citations and internal quotation marks omitted).

Our cases have held that a debtor's corporate reorganization to avoid creditors or a debtor's transfer of property to avoid creditors, without more, does not constitute willful and wanton conduct sufficient to support an award of punitive damages. See *Nachazel v. Mira Co., Mfg.*, 466 N.W.2d 248, 256 (Iowa 1991) (holding that corporate restructuring that prejudiced creditor was sufficient to support liability but not sufficient to support an award of punitive damages); *C. Mac Chambers Co. v. Iowa Tae Kwon Do Acad., Inc.*, 412 N.W.2d 593, 599 (Iowa 1987) (holding that defendants' conduct, "though ample to form the basis of liability for compensatory damages, was [not] sufficiently wrongful to support a

punitive damage award”). This is in accord with the more general notion that simple or ordinary fraud, without the existence of aggravating circumstances, is insufficient to support an award of punitive damages. See *Holcomb v. Hoffschneider*, 297 N.W.2d 210, 213-14 (Iowa 1980) (“Fraud is one of the recognized grounds for exemplary damages . . . [but] not every fraud case permits an exemplary damage award; circumstances of aggravation are present in the fraud cases allowing such damages.”). There are no aggravating circumstances in this case warranting the imposition of punitive damages. It appears the Hussains were attempting, however inartfully, to exercise recognized debtor rights.

The doctrine of fraudulent conveyances is a debtor-creditor remedy that “advances the principle that a debtor’s property constitutes a fund from which the debtor’s obligations should be paid and the debtor may not frustrate a creditor’s right to obtain satisfaction from the fund.” *Benson*, 537 N.W.2d at 756. In this case, Jasper was not the only creditor who had an interest in the transferred property. At the time of the transfer in November 2005, Great Western Bank had a significant judgment lien against the property. Woods already held a mortgage against the property. There also may have been tax liens against the property, although the parties did not sufficiently develop the record to allow for such a determination. Jasper thus had, at best, third priority to any proceeds that would have been obtained had the Hussains’ creditors executed on the property. After transferring the property and refinancing the same, the Hussains used the proceeds from the property to satisfy Great Western Bank and to pay their taxes. While the transfer may have nominally prejudiced Jasper and technically

constituted a fraudulent transfer, the Hussains certainly had the right to prefer other creditors over Jasper. See *id.* at 757 (“[A] debtor may prefer one creditor over another by way of sale, mortgage, or the giving of security to others even if the debtor’s intentions toward the nonpreferred creditor are spiteful and the action will delay or prevent the nonpreferred creditor from obtaining payment.”).

Because there are no aggravating factors here, the court’s holding to the contrary means that establishing a fraudulent conveyance, in and of itself, is sufficient to support an award of punitive damages. While some courts have reached the conclusion that proving fraud, without more, is sufficient to support an award of punitive damages, see John J. Kircher & Christine Wiseman, 2 *Punitive Damages: Law and Practice* § 19:19 (2d ed. 2013) (summarizing cases), this is not our law as articulated in *Benson*. Because there are no aggravating factors, because the transfer prejudiced Jasper nominally, if at all, and because the proceeds from the transferred property were used to satisfy other creditors, I disagree that this transfer represents “willful and wanton disregard” for Jasper’s rights.